United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

75-7362

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FOR THE SECOND CIRCUIT

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Docket No. 75-7362

PERMA RESEARCH & DEVELOPMENT COMPANY,
Plaintiff-Appellee,

v.

THE SINGER COMPANY,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF SCM CORPORATION AS AMICUS CURIAE

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4

TABLE OF CONTENTS

TABLE OF CASES

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The Interest of the Amicus Curiae

SCM Corporation ("SCM") is a diversified manufacturing company with its principal offices in New York.

As does any large manufacturer, SCM enters into contracts similar to the one in this case. Such contracts, involving the purchase of a business and the assignment of patent rights in an untried new product, obviously carry a high degree of risk for the purchasing company. Where the investment is highly speculative, the risk may, as here, be shared by having part of the payment contingent on the commercial success of the new product.

The District Court's decision will discourage such mutual risk taking. It increases the already high risks of bringing a new product to market. For the decision suggests that if the venture doesn't work out, a court may impose on one of the parties the role of guarantor of the best profits imaginable.

Similarly discouraging for businessmen to contemplate is the way the decision was reached. The parties' negotiated contract (including the important "entire agreement" provision) was disregarded and re-written by adding a new "best efforts" term which admittedly was never discussed during negotiations. That added term was then interpreted in a manner which allowed the court to go far beyond the question of good faith—to conduct an exhaustive 70 trial day review of the perhaps less-than-perfect, but commercially reasonable, technical and business judgments of buyer's employees, and to find the buyer culpable for failing to reach ideal results.

In actual commercial practice, contracts like the one in this case are carefully drawn so that the parties know exactly what their respective rights and obligations are. The parties may have high hopes, but the nature of a new product venture dictates that they carefully limit their undertakings and avoid guarantees which may not be fulfilled.

The lower court's opinion does not comport with common sense, let alone commercial practice. Where the parties, both represented by counsel, had negotiated and agreed to a comprehensive and detailed contract, how could there have been an obligation (to "perfect" the device) which was the "heart" of the contract (Op. 38-39),* yet was not expressed in the contract or even discussed when it was negotiated?

Businessmen do take written contracts seriously; and businessmen should be able to be confident that they will be obliged to do only that which they have explicitly agreed to do.

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*Citations to the Opinion of Judge Duffy will be preceded by "Op.", to Judge Bryan's opinion by "R 18", to Singer's brief by "S.Br.", and to Perma's brief by "P.Br.". Plaintiffs exhibits will be designated "PX", and defendant's exhibits, "DX".

The District Court decision is, therefore, of great interest and concern to SCM. It would have an inhibiting effect on new product ventures. It engenders uncertainties by downgrading the parties' negotiated written contract. It misconstrues the limited principle of the *Lady Duff-Gordon* case; and it unfairly imposes an additional contract obligation which reflects a lack of understanding of the commercial context in which the transaction took place.

SCM believes that the District Court decision and opinion is a bad commercial and contract law precedent. The potential significance of the case was promptly recognized by the commercial-legal world. In a two-day Practising Law Institute January 1976 seminar titled "Current Trends in Domestic and International Licensing" half of one afternoon's session was scheduled for a discussion of this case.

SCM strongly disagrees with Perma's statement that there are no real questions of law at issue on this appeal (P. Br. 2). Perma's 105-page brief is mainly devoted to an exhaustive review of the facts. SCM will, indeed, serve a function as friend of the court by its emphasis on the questions of law if, as SCM believes, the errors below are basically errors of law, the resolution of which will obviate any need for extended consideration of factual disputes.

SCM believes that Singer's brief presents ample grounds for this court to reverse the District Court decision. But there is the possibility that the decision would be reversed because of errors in the findings of the District Court, as urged by Singer, without reaching aspects of that decision which make it a particularly bad commercial law precedent. Accordingly, SCM submits that this Court would benefit from a presentation that addressed itself primarily to the errors of law which might adversely affect commercial dealings well beyond the scope of the factual situation presented by this record.

I.

The Court Below, as a Matter of Law, Should Not Have Imposed Additional Contract Terms and Conditions Which the Parties Had Never Expressed in Their Written Contract Nor Even Discussed.

When parties to an agreement demonstrate that they are capable of including specific covenants and agreements in a written contract in a proper and businesslike manner (such as the clause in the contract requiring Singer to spend $100,000 a year or have control of the product subject to reversion to Perma) it defies common experience to infer that the parties intended to leave a vital and potentially ruinous obligation unexpressed.

A. *Lady Duff-Gordon* is inapplicable—there is here no question that there was consideration and that the contract was binding.

The lower court was wrong in relying on *Wood* v. *Lucy, Lady Duff-Gordon,* 222 N. Y. 88, 118 N. E. 214 (1917) as authority for imposing an additional obligation on the agreement. Unlike the agreement in the *Lady Duff-Gordon* case, the agreement here contains express enforceable covenants by both parties.

The question in *Lady Duff-Gordon* was whether there was consideration. That case represents a practical way to enforce a contract where (a) it was obvious that both parties intended the written promises to be enforceable, *but* (b) there was *no express consideration* to render one party's promise enforceable. An unexpressed obligation was inferred because there was no other way to preserve the enforceability of other express promises (Lady Duff-

Gordon had reneged on her promise granting Wood the exclusive right to use her name) where it was absolutely clear the parties had intended to make a binding contract. The unexpressed obligation was inferred because it was *necessary* to accomplish that fundamental intent.

There is no question here, however, that there was more than ample consideration and that the December contract was binding (R 1, pp. 5-6; 410 F. 2d at 574n. 8; and see discussion *infra* at pp. 7-10, 17-18). Consequently, the necessity, and reasonableness, of inferring a "best efforts" obligation disappears.

In the early stages of this lawsuit, Singer itself argued that the December contract should be read to imply a "best efforts" obligation for Singer to manufacture and market (but not to *develop* or *"perfect"*) the device (308 F. Supp. at 748n. 16). Singer advanced this argument in opposition to Perma's contention that the entire December contract was not binding because it lacked consideration in that Singer "was not bound to any covenants or agreements and retained complete discretion as to manufacturing and marketing" (i.e., Singer's promises were all illusory). The main defense to that contention was, of course, that it was factually absurd; Singer was *expressly* obligated to confer very substantial benefits upon Perma (R 18, pp. 5-7; 410 F. 2d at 574n. 8). Singer's contention that a "best efforts" obligation could be implied was, then, an argument strictly alternative to (and mutually inconsistent with) its primary argument that consideration was abundant. Although the arguments are mutually exclusive, nevertheless it was eminently reasonable for Singer to make both of them because (i) it is always possible that the primary argument will be rejected by a court, and (ii) as a matter of its own intentions, Singer did in fact expect to begin manufacturing and marketing the device soon.

Indeed, it was reasonable for both parties to expect that Singer was going ahead with a program to manufacture and market the product. But that reasonable expectation was based on a recognition that it was in Singer's self-interest to try to make the program successful, and not as a result of an agreed specific contract obligation.

Is this to say that Singer could have signed the contract and then on the next day abandon the project and walk away from any attempts to manufacture or market the product? The answer is "yes," so long as there was no bad faith inducement of the contract. For example, if the day after the signing there were some intervening event unanticipated at the time of the signing (such as the surprise introduction of a less expensive and superior product), Singer could have abandoned the project; and Perma still would have received substantial benefits from the contract.

Absent such a surprise intervening event, Singer's precipitate abandonment of the project would probably have been wrong and would give rise to liability, not because Singer was obliged to do something under the contract, but because such abandonment would be so inconsistent with the parties' expectations as to be strong evidence of a lack of good faith and of fraudulent inducement. But that was not the case here; and this court properly affirmed the summary dismissal of plaintiff's fraud claims, 410 F. 2d at 576-78.

Apposite is *HML Corp.* v. *General Foods Corp.*, 365 F. 2d 77 (3d Cir. 1966), where the court applied New York law, distinguished *Lady Duff-Gordon,* and declined to add to an agreement a term requiring buyer to use its best efforts to exploit a salad dressing trademark. Seller was to supply all of buyer's requirements of that salad dressing and was objecting to buyer's decision to discontinue pro-

motion of the product; in rejecting seller's argument for imposing a "best efforts" obligation, the court stated:

> "The better view, however, is that generally the buyer in a requirements contract is required merely to exercise good faith in determining his requirements and the seller assumes the risk of all good faith variations in the buyer's requirements even to the extent of a determination to liquidate or discontinue the business. The rule is based on a reliance on the self-interest of the buyer, who ordinarily will seek to have the largest possible requirements. . . . The requirement of good faith is the means by which this is enforced and self-interest in its undistorted form is maintained as the standard. New York accepts this view (citing cases)." 365 F. 2d at 81.

The key point, then, is that no obligation requiring best efforts to exploit the invention may be implied here because of the unquestioned existence of consideration, including, among other things, a $24,000 up front payment, assumption of an obligation to purchase $41,207 worth of component parts, assumption of $300,000 of liabilities, and assumption of obligations under distributorship agreements (PX 60A, paras. 1(b), 5(e), 17). For this was not a simple exclusive patent license (where the absence of minimum royalties might, using Judge Duffy's word, have been "unusual"); instead, this was a complex transaction more in the nature of a sale of a business, with contingent payment by way of "royalties" based on future sales, if any. See *HML Corp. v. General Foods Corp., supra,* which stressed that the "sole compensation" in the *Lady Duff-Gordon* contract was the interest in the profits resulting from Wood's efforts to exploit the name, whereas the HML contract, like that here, "was not the simple grant of an exclusive distributorship." 365 F. 2d at 80.

Similarly applicable in distinguishing *Lady Duff-Gordon* is the reasoning in *American Sealcone Corp.* v. *Sylvan Seal Milk, Inc.*, 42 F. Supp. 480 (E. D. Pa. 1941), involving the leasing of patented container manufacturing machines, where the court stated:

> "Moreover, there is no reason to imply a promise such as plaintiff contends for in this case. Plaintiff did not rely on the royalties as its sole compensation, but took the precaution of demanding and receiving an initial license fee of $72,500 for the use of its machines. Nor did it stipulate for minimum royalties. The obligations of the defendant to the plaintiff were clearly expressed in the agreement and there is no basis for implying what would have been expressed if intended." 42 F. Supp. at 482.

B. The parties' w ten contract refutes the existence of the implied open-ended obligation imposed by the District Court.

When we do refer to the express language of the parties' contract we find provisions that (a) "Buyer in *its absolute discretion* shall determine the method of manufacturing, *exploiting* and marketing the Product" and, (b) after two years Singer is required to spend at least $100,000 annually on marketing and promoting the Product if it wants to be sure of keeping it (PX 60A, paras. 13, 10; emphasis added).

Nobody has claimed that Singer was obliged to exploit the device even if it didn't work and consumers didn't want it. Thus, the absolute discretion to determine the method of exploitation must necessarily subsume the right to determine not to exploit the product at all. It can also be seen as an expression of the parties' intent that Singer would not be subject to the kind of after-the-fact review of its

business judgments which takes up a good part of the District Courts' opinion and Perma's 105-page brief.

The requirement of marketing expenditures of $100,000 annually after two years is the parties' explicit agreement with respect to Singer's exploitation of the device. It shows that where the parties wanted such a provision, they knew how to include it in a practical businesslike way. And they did so, eliminating the possibility of disputes based on subjective after-the-fact judgments, by using an easily ascertainable objective standard, a specific dollar amount.

It is important to note that the minimum marketing efforts were not expressed as an obligation or covenant of Singer. If, for whatever reason, Singer did not make the minimum expenditure, the whole business (including patents, technology, and tools) would automatically be subject to reacquisition by Perma upon payment of a specified sum (PX 60A, para. 10). Accepting Perma's contentions about the great value of the device, that reversion right was presumably better for Perma than, for example, a minimum royalty provision.

Pertinent on this point is *Eastern Electric, Inc.* v. *Seeburg Corp.*, 427 F. 2d 23, 25, 27 (2d Cir. 1970), which involved the sale of a cigarette vending machine business, including patents. There, this court rejected seller's *Lady Duff-Gordon* argument for an implied obligation to exploit the patents, and cited as one of the factors the existence of a similar reversion and repurchase option.

To the same effect is *Vacuum Concrete Corp.* v. *American Mach. & Fdry. Co.*, 321 F. Supp. 771 (S. D. N. Y. 1971), in which Judge Mansfield rejected seller's claim that a term requiring best efforts to exploit a licensed device should be implied, and granted a summary judgment motion dismissing the complaint. One of the factors

militating against imposing such a covenant was seller's right to terminate if royalties did not reach a certain level in four years. 321 F. Supp. at 773-774.

Consistent with the commercial contract practice reflected in those cases, the minimum marketing expenditure was not expressed as an *obligation* of Singer but rather as a *condition* to Singer's right of unrestricted ownership of the patents and business. This, of course, argues against an implied generalized best efforts term since the explicit provision means that if Singer spent nothing on marketing, it would not have breached the contract but only lost control of the product. This form shows quite clearly both parties' recognition that (a) there might be unforeseen obstacles to marketing the device, and (b) Singer might well decide to cease investing money in the device even though Perma, or another party, might wish to continue.

The reversion provision is particularly appropriate to this transaction, for it gives recognition (as Judge Duffy's open-ended implied unexpressed term does not) to the inherent uncertainties surrounding the introduction of any new product.

C. The parties' written technical services contract refutes the existence of the implied open-ended obligation imposed by the District Court.

In finding an implied obligation of Singer to use its best efforts to "perfect" the device, Judge Duffy relied on a consulting agreement, termed a technical services contract, which had been entered into simultaneously with the December contract. It showed, he concluded, that "further engineering work was contemplated by the parties" (Op. 19).

Initially, we note that, for the reasons stated in the Argument above, there can be no warrant, whether from an interpretation of the consulting agreement or otherwise,

for imposing an additional obligation on the December contract. At that, the thrust of the consulting agreement undercuts, rather than supports, the District Court's inference of a "best efforts" obligation.

Even accepting Judge Duffy's statement that the consulting agreement shows that the parties contemplated some engineering work would be done, it does not follow that Singer had an *obligation* to do engineering work to "perfect" the device. Again, the omission of an express obligation points in the opposite direction. And, of course, in the consulting agreement itself the only obligations to do work are obligations of Perma to consult and give assistance, at the request and at the option of Singer.

Judge Duffy said, "Singer knew that the device was still to be perfected for why else would it have entered into the Technical Services Contract?" (Op. 39). But both the agreement itself and the circumstances of its adoption suggest several other reasons.

The agreement is extremely broad and general but, even so, mentions several areas of work that would be necessary even if the device were design-perfect, such as the adaptation of the device for various models of cars and trucks, and the testing of such adaptations or production samples (DX 656).

Further, where a consulting agreement is made as part of a sale of a business, as here, it very frequently represents both a precaution against possible confusion during transition and additional compensation to the seller. On the one hand, the buyer wants the proprietor and a few key employees to be available for a limited time period when the buyer is first taking over the business, without necessarily expecting extensive consulting with the seller. (Judge Duffy's opinion suggests that, in fact, there wasn't much consulting under the agreement here, Op. 35). From the seller's standpoint, it enables him to continue receiving some

salary during a period when he is turning his attention to other endeavors.

The consulting agreement is strong support for an inference opposite to the one Judge Duffy drew. The short six-month term of the consulting agreement, with no right of renewal, implies that there was no expectation of an extensive Singer research and development program to "perfect" the device because, as indicated by Perma's expert at the trial, such a program would have required some 12-15 months (P. Br. 22-23; S. Br. 13-14).

D. The implied open-ended obligation imposed by the District Court is unrealistic in the extreme.

Assuming *arguendo,* that Judge Bryan was correct in finding that a cause of action ("barely sufficient to withstand a motion to dismiss") could be based on an implied promise requiring Singer to use its "best efforts to market and manufacture" the device (R 18, pp. 8, 15), it was error to expand that obligation into a requirement that Singer use its "best efforts to perfect and market the device." (Op. 38)

Judge Bryan's holding was first broadened by Judge MacMahon (308 F. Supp. at 748-49); and the 70-day trial was apparently directed to the issue as stated in an example given by Judge MacMahon. Judge Duffy's statement of the implied obligation was as follows:

> "The contract before this Court is not merely an assignment of patents. Rather, clearly implied in the contract is the intention that Singer would use its best efforts to perfect and market the device.
>
> "Though the words of the contract do not spell out this obligation, the circumstances leading to the signing of the contract mandate such an implied obligation. See *Wood* v. *Lucy, Lady Duff-Gordon.*

> . . . It is true that Perrino testified that he did not discuss anything about perfecting the device at the time he entered the contract. But it is clear that the perfection and marketing of the device was the heart of the December 21, 1964 contract." (Op. 38-39)

But that conclusion is contrary to common sense and ordinary commercial practice. It simply could not be that two companies, both represented by counsel, would negotiate and agree to a contract where the obligation which was the "heart" of the contract was never discussed, let alone spelled out in the written document.

As we've said, in the real world, businessmen do regard written contracts with great seriousness. They read them carefully and, with their counsel, they try to make sure exactly what it is they are agreeing to do. A businessman agreeing to devote efforts to the always chancy endeavor of research and development, would make his obligation as objective and quantifiable as possible so as to remove any future question about whether there had been performance. Thus, if the parties had wished to do so in this situation, provisions would presumably have been made for the expenditure of X amount of dollars, the assignment of Y number of qualified engineers to spend a total of Z man-hours, and so on. This was, in fact, the parties' approach in the reversion clause in the contract. (See the discussion *supra*, 8-10.)

In the unlikely event that a businessman were to agree to an open-ended undefined obligation to use best efforts to develop, "perfect,"* manufacture and market a new

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*Judge Bryan's phrase, "best efforts to manufacture and market," is more readily comprehensible than Judge Duffy's "best efforts to perfect and market" phrase. The word "perfect" is not a term of art; and it is unrealistic to postulate such an undefined and open-ended word as part of a clause in a commercial agreement.

product, he would necessarily expect only that he was agreeing to use his good faith best efforts and that both his day-to-day business decisions and the larger decision of whether to proceed with the project or to abandon it would be matters solely within the good faith exercise of his discretion.* (Cf., *HML Corp.* v. *General Foods Corp.*, 365 F. 2d at 81).

E. The District Court was incorrect in disregarding the parties' explicit agreement that the contract ". . . contains the entire understanding of the parties . . ."

The District Court was wrong in ignoring a vital clause in the contract, the "Entire Agreement" clause, which reads:

> "This Agreement, including the Exhibits and Schedules referred to herein which are a part hereof, contains the entire understanding of the parties hereto with respect to the subject matter contained herein and may be amended only by a written instrument executed by Seller and Buyer or their respective successors or assigns. *There are no* restrictions, *promises,* warranties, *covenants,* or *undertakings* other than those expressly set forth herein." (emphasis added) (PX 60A, para. 18).

This is not a trivial provision. Its purpose is precisely to avoid the kind of injury that has already occurred: the payment of enormous litigation expenses in disputes over the existence, definition and performance of a claimed obligation that was never even discussed. This clause is

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*Here, of course, the written contract itself expresses that kind of an understanding in paragraph 13, where it states that "*Buyer in its absolute discretion* shall determine the method of manufacturing, *distributing* and marketing the Product." (emphasis added) (PX 60A, para. 13).

the functional and literal equivalent of a series of express declarations in the contract that "Singer is not obliged to do X, Y, Z, etc." Consequently, to ignore it, as Judge Duffy did, is to hold that parties will not be permitted to make the kind of contract that actually means what the December 1964 contract says.

It is not a satisfactory answer to argue that an express negating of a "best efforts" obligation would be honored. Such an argument would then impose on contracting businessmen and their lawyers the burden not only of defining with precision their mutual rights and obligations, but also of listing all conceivable obligations which they are *not* assuming.

New York law recognizes the importance of such clauses. Thus, in *HML Corp.* v. *General Foods Corp.*, *supra*, 6-7, one of the factors cited by the court in declining to find an unexpressed best efforts obligation, is a similar "Entire Agreement" provision in the contract. 365 F. 2d at 82.

Similarly, in *Vacuum Concrete Corp.* v. *American Machine & Foundry Co.*, discussed *supra* at p. 9, Judge Mansfield's summary judgment dismissing the complaint was based in part on the parties' "Entire Agreement" provision in the contract. He cited the leading New York case, *Fogelson* v. *Rackfay Construction Co.*, 300 N. Y. 334, 90 N. E. 2d 881 (1950), and he declined to find an implied obligation to exploit the device because "to do so would be to make a mockery of the detailed written Agreement reached as the result of skilled legal negotiations." 321 F. Supp. at 774, 775.

Suppose that two parties wish to create a binding agreement precisely as expressed in the Perma-Singer December contract. If the District Court opinion stands, how could anyone be reasonably confident that any form of words

would be adequate to protect him from a charge that he breached some unexpressed but un-negated obligation?

II.

The District Court's Opinion Reflects a Lack of Understanding of the Commercial Context in Which the Transaction Took Place.

Judge Duffy suggests that the December contract was "foisted on Perma" by Singer (Op. 40). This reflects a fundamental misconception of the commercial setting in which the contract was made and of the reality that it was Perma's conduct which, on the facts stated in the opinion, is the more censurable.

A. The December contract was a good one for Perma.

There is no basis here for any contention (and Perma has made none) that the contract should be re-made because it was inequitable as written. Indeed, just accepting the facts stated in Judge Duffy's opinion, it appears that Perma was quite fortunate in obtaining the December contract. When viewed from Perma's perspective on December 20, 1964, the December 21 contract looks like quite a good bargain.

Perma Research and Development Corporation apparently had no business other than trying to promote its anti-skid device. Prior to getting together with Singer in June of 1964, Perma had been unsuccessful in trying to get experienced automotive manufacturers interested in its device. Apparently Perma obtained some financing and had contracted for some manufacturing, but there never were any substantial sales of the device. (Op. 7-8)

Although Perma had acquired some patents, it had never produced a reasonably workable product. According

to Perma's brief on this appeal, even as late as December 1964, the development of the device had not been completed and there were multiple defects. (Op. 13-15, 23; P. Br. 9-15, 17-18)

Singer contends that before the December contract it was not aware of the extensive design deficiencies in the existing product. But Judge Duffy found that "Singer knew that the device was still to be perfected" and "offered its purported engineering expertise to perfect the device". (Op. 39)*

Accepting Judge Duffy's findings on this point, it would appear that in December 1964 both Singer and Perma had every reason to believe that bringing this product successfully to market would be an extremely speculative venture. There was no assurance that Perma's device could be made to function adequately, let alone be marketed profitably.

If so, Perma was then virtually at the end of its rope, with a potentially dangerous, incompletely developed product already in its distributors' hands, obligations to its distributors which it could not meet, and bankruptcy imminent. (Op. 15, P. Br. 34-35)

In these circumstances, the December contract was an excellent one for Perma. Singer removed the threat of bankruptcy by assuming almost $300,000 worth of liabilities and by assuming Perma's obligations under the distributor agreements (something which, according to its brief [S. Br. 10], cost Singer over $225,000 when it had to terminate the distributor agreements and take back defective products). Perma was made solvent, getting the benefit of an interest-free loan for five years, and also getting Singer's agreement to pay $24,000 cash on the closing and to pay

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*SCM adopts the arguments in Singer's brief that there was no knowledge or intention on the part of Singer to perfect the product (nor, for that matter, was there such knowledge or intention on the part of Perma, which all along maintained that the product had been perfected). (S. Br. 15-31)

at least $9,800 per month for six months—a total of $82,000 cash, not inconsiderable for a small company like Perma.

Although Singer was not commiting itself to expend any additional efforts, the practical likelihood was that Singer would be spending money to try to save its large investment of over $1 million (in fact, Singer spent an additional $600,000 on such efforts) (P. Br. 23n. 25). If things did work out, and the products were marketed successfully, Perma would be paid very substantial royalties, while incurring no further financial risk. If, for whatever reason, Singer were unable to market the product successfully and didn't spent at least a hundred thousand dollars in its second year under the contract or in any year thereafter, Perma could line up other financing or other purchasers and could get the product back (in which case, of course, Singer would lose most of what it had invested).

B. The District Court Opinion posits an unreal world in which Singer could do nothing right, Perma's course of conduct is overlooked, and assumptions are made contrary to commercial experience.

The parties' conduct

The District Court in effect built a case against Singer by construing every action of Singer as though it were the product of malignancy or incompetence. But almost all of Singer's criticized conduct, as described in the opinion, might appear to the businessman-reader as rather ordinary events of the business world; upon reflection, the worst that can be said about Singer from Judge Duffy's own observations is that its employees were sometimes too optimistic, too trusting (in Perma) or too cautious (in marketing a new device).

We list here merely a few of the instances where Judge Duffy suggests sinister significance in activities of Singer that appear to be entirely innocent and routine.

(a) In their very early talks, Singer left with Perma a brochure that was "boastful" about Singer's engineering capabilities (Op. 10). Why characterize the brochure as "boastful"? There is no finding that it was false or intended to be misleading.

(b) After some Singer executives became concerned about the safety of the device, legal counsel were kept closely informed (Op. 27, 28). Can a court criticize businessmen for being diligent in seeking legal advice?

(c) Some Singer executives were "grumbling" about the non-profitability of the Perma program, and Singer was reluctant to make a design change that would have made worthless much of Singer's inventory (Op. 25, 23). See also Op. 21. Is it wrong for a corporate officer to be concerned about expenses? How could Singer fail to take account of a substantial inventory loss in evaluating whether to make a proposed design change?

(d) Judge Duffy finds it "astounding" that Singer would not let Kelsey-Hayes, a *competitor,* analyze its device (Op. 23).

(e) "Corporate politics inside Singer called for a shake-up in management" (Op. 25). Is there really any evidence that the management changes were motivated by personal power plays rather than by the far more frequent good-faith efforts to improve performance?

These innuendoes, and others, are sufficient to make a businessman despair that he will ever be able to communicate to a court the essential facts about the ambience in which he works; they also appear to create an unresolvable tension between his duty to use his corporation's assets prudently and his *post hoc* court-imposed duty to bend every effort to satisfy an outsider's expectations that his "inven-

tion" can be "perfected" and profitably marketed. On Judge Duffy's own discussion of the facts, his criticism seems unrealistic and unreasonable.

Rhetoric aside, Judge Duffy's opinion comes down to his conclusions that the Singer employees ought to have seen through Perma's sales pitch, ought to have assigned more competent men to the project and ought not to have been so cautious about attaching a new device to automobile brake systems.

Even assuming the accuracy of all specific facts found by Judge Duffy, Perma's conduct was markedly more censurable than Singer's. To the extent that Judge Duffy overlooks Perma's conduct, the decision makes a bad commercial law precedent. (Judge MacMahon takes a less permissive view of such conduct, 308 F. Supp. at 747-48.) Without dwelling too much on the subject, it is worth reviewing the facts in the opinion and considering how they might strike a lay businessman reader.

Judge Duffy found that Perma had made representations that the device was "failsafe" and "perfected" (Op. 8-9), although he characterized the latter statements kindly, as "puffing" (Op. 34). On all the facts recited in his opinion, the situation is more serious than that. There was a recurring pattern of such statements, which would typically undermine ordinary business relationships.

Perrino, Perma's president, was an inventor and a promoter who had formed a small research and development corporation. He was unsuccessful in trying to get experienced automobile manufacturing companies interested in his device. He did make a promotional film which, among other things, included the representation that the device "includes a fail-safe feature which will automatically revert to the standard braking system of the car." He got a "glowing" test report from an "independent laboratory" which, it later turned out, had agreed to do the testing in

exchange for a portion of Perma's capital stock and a place on Perma's board of directors. (Op. 5-9)

Perrino got the interest of a couple of Singer men who were in charge of a largely idle sewing machine manufacturing plant. He told them the device was fail-safe. He showed them the promotional film and the test report but concealed the tester's affiliation with Perma and an unfavorable DuPont test report (Op. 7, 23, 33). Then, even after he had got Singer signed up in June 1974, during the period prior to the December contract, and up through the time of the lawsuit, he continued to represent that the product design—his responsibiiity—had been perfected or that the device was fail-safe (Op. 33-34; 308 F. Supp. at 747-748). These representations were made to Singer people who were inexperienced in the manufacture, let alone design and development, of such a product. (Op. 8-11, 29)

Now to award Perma damages for Singer's alleged failure to perfect the device—for failure to do what Perma said it had already done—would be inequitable in the extreme. As a matter of fundamental fairness, Perma should be estopped from recovering on the basis of contentions inconsistent with its past representations.

The lack of commercial realism

Throughout Judge Duffy's opinion there is a dreamworld lack of commercial realism.

> If the product could be developed and perfected and marketed as easily as he found it could be, why had experienced automotive manufacturing companies not done so long before the trial?
>
> Why did Perma not mitigate damages by exercising its reversion rights?
>
> How could Judge Duffy rely on optimistic projections made by a Singer salesman seeking to

> justify further investment in the project, where the projections apparently related to an unperfected, probably less expensive, product and failed to consider revised cost and price factors or competition?
>
> How could Judge Duffy accept projections which were way out of line with the actual subsequent experience of superior products marketed by people experienced in the field?

It is hard to think of a case which better demonstrates why the courts do not allow damages of so speculative a nature; to allow such damages would be to undermine the credibility of the courts in resolving commercial disputes.

This brings us back to the fundamental error in this case: disregarding the written contract. If the parties had been held to that to which they agreed in a detailed written contract, there would have been no need for a nine-year case ending in a 70-day trial in which the weaknesses of the adversary system, with its elements of "the sporting theory" led to weeks of testimony and attempts to find fault and to find villains where there may well have been none—where all that really happened was that a high-risk business venture didn't work out.

Conclusion

SCM respectfully submits that in all the circumstances here, under New York law, the parties should be bound only by the terms of their written agreement and that the contract should not be remade by imposing additional unexpressed open-ended obligations.

For the reasons stated, this court should reverse the lower court decision and grant summary judgment dismissing the complaint.

Respectfully submitted,

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Dated: January 23, 1976.